



THE American Surveyor

A FOOT IN THE PAST... AN EYE TO THE FUTURE

Sept/Oct 2005

George Washington's Gift

New Technology

Real-time 3D mapping

Profile

David Evans and Associates

Mapping the Badlands

Using handheld GPS for locating assets

\$4.95

The Quasi-judicial Functions of the Land Surveyor

Part I: Junior-Senior Rights



As surveyors, we often encounter discrepancies between record and measured values.

Commonly we find excess or deficiency in the dimensions of a parcel that has been subsequently subdivided by deeds, thereby creating *apparent* gaps or overlaps between the newly created parcels. The adjoining property owners are usually not aware of the discrepancy until one of them has a survey.

The issue of an *apparent* overlap is one that most survey professionals including authors of standard survey textbooks deal with easily. Professional responsibility demands that the surveyor examine the chain of title, determine the order in which the deeds were executed and identify the junior/senior rights. He or she then allocates to the senior parcel(s) the full measure conveyed, with any excess or deficiency falling upon the junior parcel(s).

The issue of an *apparent* gap is one with which many (including some textbook authors) are less comfortable.

The issue should be analyzed in light of the rules that our courts have announced. Where there are conflicting title elements the law declares the order of importance:

- 1) Right of Possession
- 2) Senior Right
- 3) Written *Intentions* of the Parties to the Transaction

As an example, if Brown conveys the “W’yly 330.00 feet of Lot 7” to Green, later conveying the “E’yly 300.00 feet of Lot 7” to Grey, and the record shows that the east-west dimension of Lot 7 is 630.00 feet, it is obvious that Brown *intended to convey all his interest in Lot 7* (see **Figure 1**). If Lot 7 subsequently measures 633.00

feet, the surveyor would locate the line between Green and Grey at 330.00 feet from the west line of Lot 7. Grey would own the E’yly 303.00 feet of Lot 7. In *Adams v. Wilson*, 137 Ala. 632 (1902) and *Bloch v. Pfaff*, 101 Mass. 535 (1869), the courts ruled “*where the parts of lots are conveyed without reference to a plat or there is nothing in the deeds to indicate a purpose to divide the land in some definite proportion any excess in the quantity of the land must go to the last grantee and any deficiency must be borne by him.*” To hold that Brown still owned the three-foot “gap,” you have to believe that he intended to keep the excess, which he did not know existed.

>> By Paul A. Cuomo, LS

Brown’s
Conveyances
to Green and
Grey

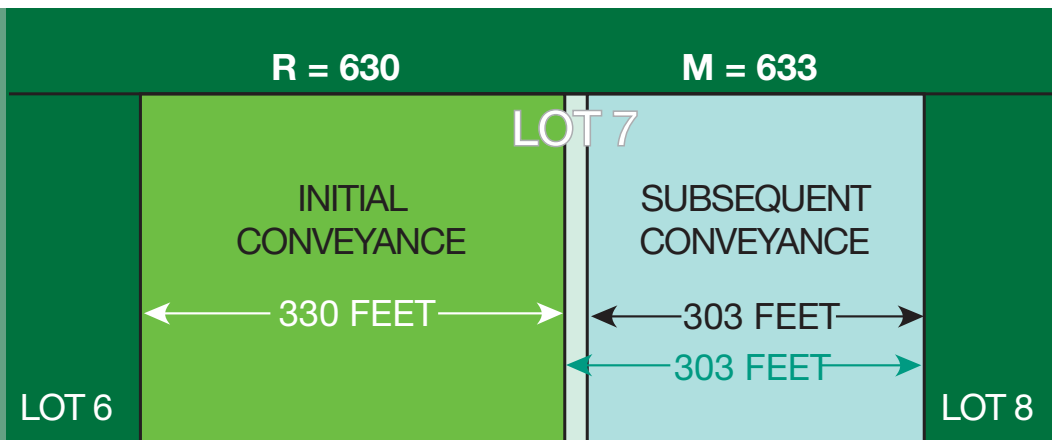


Figure 1

Two exceptions to the above stated principle may exist. First, in *Writing Legal Descriptions* Gurdon Wattles states, “If Parcels A and B were sold simultaneously, or within a few months of each other, it has been held in some cases that the gap should be prorated between them, also on the theory that the common owner never meant to keep any of the lot from his sale but intended to divest his interest on the proportionate basis of the two deeds.” In *Ogden’s Revised California Real Property Law* Arthur Bowman states, “Any surplus or deficiency is apportioned when it appears that the conveyances were intended to embrace the entire tract, as in the case of division by partition or by conveyances all executed at the same time.” He adds, “It is reasonable to presume that a grantor who divides and conveys a lot to two persons, by descriptions that would join if the lot were of the size shown by the records, did not intend to retain title to a narrow strip of surplus land shown by subsequent measurements to exist.”

In essence, the courts are treating the parcels as having been created simultaneously, rather than sequentially. *Black’s Law Dictionary* defines *simultaneous* as “a word of comparison meaning that two or more occurrences or happenings are identical in time.” It also defines *identical* as “Exactly the same time for all practical purposes.” The problem that the surveyor faces is how much time has to elapse before the parcels are not considered as being conveyed simultaneously.

I disagree with Wattles that parcels conveyed within “a few months of each other” could be considered as being

created simultaneously. But what is the cut-off? If possession has not taken place and the surveyor has a question about the interpretation of the deeds, it would be prudent to meet with the adjoining and suggest a Boundary Line Agreement.

As with other matters in boundary determination, the surveyor must first gather all of the evidence. The question is, what was the true intention of the parties on the date of conveyance? If the grantor met with the subsequent grantees and they (collectively) agreed to the division (descriptions), proration would be reasonable since the agreement was simultaneous despite the fact that the deeds were sequential.

The second exception can occur when the gap is large and/or has a *separate economic viability*. As an example, Brown owns a tract of land with a record area of 800 acres. He conveys the “west 450 acres” to Green and the “east 350 acres” to Grey at a later date (see **Figure 2**). When the tract is surveyed, it is found to have 840 acres. As previously discussed, if the gap is small I would not hesitate saying it belonged to Grey. The question is, what is *small*? Forty additional acres added to an original 45 acres would not be “small,” but what if they are added to an original 350 acres (more than 10% difference)? I would be hard pressed to say that Grey would gain that much land (40 acres). I would contact Brown or Brown’s heirs and, if he or his heirs had no interest in the land, (unlikely), suggest that a portion be conveyed to

Green and a portion to Grey in proportion to the original areas conveyed.

In summary, surveyors deal constantly with excess and deficiencies in measurements of parcels that have been sequentially subdivided. When these discrepancies are minor, the law requires that the senior deed receives its full deeded quantity (no more, no less) and that the remainder goes to the junior parcel or parcels. However, when the discrepancy is large or when the supposedly sequentially created parcels take on the elements of a simultaneous conveyance, other methods of distributing the excess or deficiency must be looked at. Whenever title is confused or alternate locations are reasonable, the professional surveyor has a duty to attempt to assist the parties in reaching a mutually acceptable resolution.

Stay tuned for Part Two, in which I will discuss how to determine senior rights and how senior rights can change. *AS*

Author’s note: I would like to thank my mentor, Chuck Karayan, for reviewing this article.

Paul A. Cuomo is President and owner of both Pacific Land Seminars, Inc., and Paul Cuomo Press, Inc. Licensed in California since 1973, he was a surveyor for the CA Division of Highways from 1958-1980, and was employed as Deputy Surveyor of Orange County from 1980-1993. He currently serves as a boundary consultant, instructor, and expert witness, and has authored and co-authored numerous surveying publications.

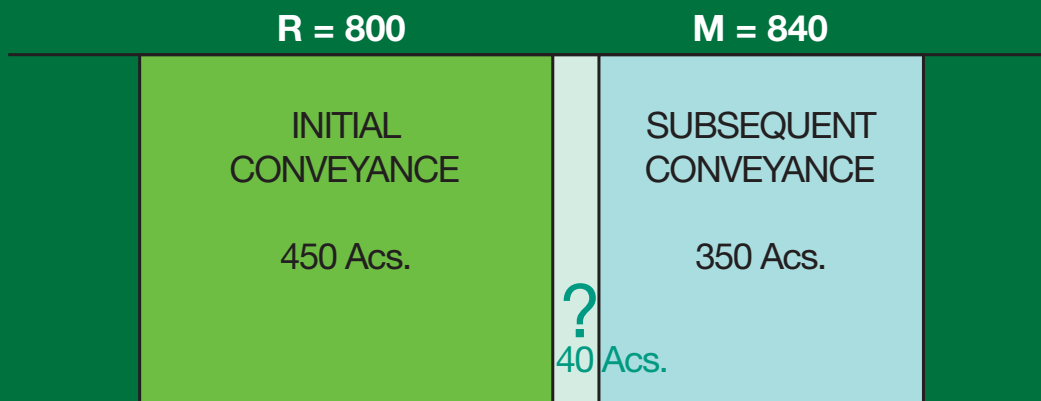


Figure 2